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Cover Page Footnote

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CLARIFYING THE CURATIVE ADMISSIBILITY DOCTRINE: USING THE PRINCIPLES OF FORFEITURE AND DETERRENCE TO SHAPE THE RELIEF FOR AN OPPONENT'S EVIDENTIARY MISCONDUCT

*Edward J. Imwinkelried**

INTRODUCTION

Suppose that during trial, the opposing attorney deliberately violates an evidentiary rule in a way that causes your client to suffer a wrongful, adverse verdict. Of course, you have the option of filing an ethics complaint against the opposing attorney with the state bar organization, but there is certainly no assurance that the bar will undo the wrong your client has suffered. First, there is no guarantee that the bar will impose any meaningful sanction on the offending attorney. Moreover, even if the bar eventually takes some action against the attorney, there may be a substantial delay between the filing of the bar complaint and the imposition of discipline on the attorney. Finally, even when the bar ultimately imposes a severe sanction on the attorney, that sanction is no substitute for the verdict that your client was wrongfully denied.

To some extent, the curative admissibility doctrine is intended to afford your client the relief that the bar discipline system fails to provide.[1] By virtue of that doctrine, if the opposing attorney injects inadmissible evidence into the record, the trial judge may allow the injured party to respond in kind to cure the damage done by the introduction of the inadmissible evidence.[2] The relief is immediate rather than delayed; instead of awaiting the outcome of a bar disciplinary proceeding following the trial, the injured party is granted relief during the trial itself. Further, the relief is far more likely to be adequate. If the judge permits the injured party to introduce otherwise inadmissible evidence that effectively counteracts the evidence injected by the opposing attorney, the rebuttal evidence may very well prevent a miscarriage of justice.

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1. Francis A. Gilligan & Edward J. Imwinkelried, *Bringing the "Opening the Door" Theory to a Close: The Tendency to Overlook the Specific Contradiction Doctrine in Evidence Law*, 41 Santa Clara L. Rev. 807, 816–35 (2001).

2. *See* Henderson v. George Washington Univ., 449 F.3d 127, 140 (D.C. Cir. 2006).

The rub, though, is that several of the parameters of the curative admissibility doctrine are poorly defined.[3] The courts frequently invoke the vague expression "open[ing] the door,"[4] resulting in blurring the distinctions between curative admissibility and related doctrines such as specific contradiction impeachment.[5]

The modest purpose of this essay is to redefine the scope of the curative admissibility doctrine. To do so, the essay relies on two basic principles: forfeiture drawn from criminal procedure jurisprudence and deterrence borrowed from legal ethics. The first part of the essay presents the policy proposal for invoking those two principles to reshape curative admissibility. The second part of the essay demonstrates that this proposal can be implemented without amending the Federal Rules of Evidence. At first blush, some might question the propriety of using an evidentiary doctrine to deter legal ethics violations, but, on closer scrutiny, in this narrow context pressing evidentiary doctrine into the service of legal ethics is perfectly legitimate.

I. THE POLICY CASE FOR USING THE PRINCIPLES OF FORFEITURE AND DETERRENCE TO RATIONALIZE THE CURATIVE ADMISSIBILITY DOCTRINE

A prior article documented the confusion surrounding the curative admissibility doctrine and made a limited effort to differentiate that doctrine from specific contradiction impeachment.[6] However, this essay undertakes to employ the basic principles of forfeiture and deterrence to redefine the doctrine.

In the final analysis, the curative admissibility doctrine poses two questions for a trial judge. After a litigant injects inadmissible evidence, the initial question facing the trial judge is whether he or she should allow the other party to respond by introducing inadmissible evidence. Part I.A submits that the answer to that question should turn on the principle of forfeiture. If the judge resolves the first question in the affirmative, the judge then reaches the second question. That question is how far the judge ought to permit the other party to go in attempting to counteract the inadmissible evidence presented by the offending attorney. If the offending attorney committed the evidentiary misconduct during the direct examination of one of his or her own witnesses, should the judge merely allow the injured party to cross-examine that witness to undo the damage, or should the judge permit the injured party to go to the length of presenting extrinsic evidence for that purpose? Part I.B demonstrates that while the forfeiture principle prescribes an outer limit to the judge's discretion, the

3. *See* Gilligan & Imwinkelried, *supra* note 1, at 816–35.

4. *Henderson*, 449 F.3d at 140; United States v. Beason, 220 F.3d 964, 967 (8th Cir. 2000); Jackson v. State, 728 N.E.2d 147, 152 (Ind. 2000); Gilligan & Imwinkelried, *supra* note 1, at 821–23 (collecting cases).

5. Gilligan & Imwinkelried, *supra* note 1, at 816–23.

6. *See generally id.*

trial judge should look to the deterrence principle to determine the extent of the injured party's rebuttal response.

A. *The Forfeiture Principle Relevant to the Threshold Question of Whether the Other Litigant Should Be Permitted to Respond with Otherwise Inadmissible Evidence*

1. The Basic Principle of Forfeiture

In 1977, Professor Peter Westen wrote his seminal article distinguishing between waiver and forfeiture.[7] Today, the courts routinely distinguish between those concepts.[8] However, just as contemporary courts often confuse curative admissibility and specific contradiction impeachment, at the time of Professor Westen's article the courts were struggling to differentiate between forfeiture and waiver. Westen extracted his proposed concept of forfeiture from a synthesis of U.S. Supreme Court cases addressing the question of when an accused's guilty plea forfeited an otherwise meritorious constitutional claim for purposes of appeal.[9]

As he strove to synthesize the case law, it became apparent to Westen that the answer did not depend on the accused's subjective intent.[10] The Court found forfeiture without regard to the accused's state of mind.[11] On occasion, the Court concluded that a pleading accused had forfeited constitutional claims even when the prosecution could not demonstrate an intent to waive.[12] The accused was sometimes held to have forfeited his or her claim by pleading guilty even when, at the time of the plea, the accused had no way of knowing that the claim even existed.[13] Those Supreme Court opinions pointed to the conclusion that forfeiture differed fundamentally from an intention-based waiver concept.

Rather, Westen discovered that the key to reconciling the forfeiture cases was a showing of actual[14] prejudice to the opposing litigant, that is, the state.[15] The accused had pleaded guilty, and if the accused were later permitted to raise the constitutional claim, the state would be in a much worse litigating position.[16] If the accused had pleaded not guilty and put the prosecution to its proof at trial, the prosecution would have gathered and

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7. *See* Peter Westen, *Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 Mich. L. Rev. 1214 (1977).

8. United States v. Haddad, 462 F.3d 783, 793 (7th Cir. 2006).

9. Westen, *supra* note 7, at 1215.

10. *Id.* at 1214.

11. *Id.* at 1214, 1254.

12. *Id.* at 1215.

13. *Id.* at 1218.

14. *Id.* at 1237, 1256.

15. *Id.* at 1216, 1259 (discussing Tollett v. Henderson, 411 U.S. 258 (1973); Parker v. North Carolina, 397 U.S. 790 (1970); McMann v. Richardson, 397 U.S. 759 (1970); Brady v. United States, 397 U.S. 742 (1970)).

16. *Id.* at 1237.

presented the relevant evidence.[17] However, by pleading guilty, the accused has led the government to believe that it would be unnecessary for it to collect and introduce the evidence. The government reasonably believed that the accused's case would never go to trial.[18] The government had relied to its detriment[19] and changed position to its disadvantage.[20] If years later the accused were allowed to litigate the constitutional claim, the government would be in a much worse position vis-à-vis the defense.[21] The government would be at a serious disadvantage,[22] and it would be virtually impossible to put the government back in the same litigating position that it enjoyed prior to the accused's guilty plea.[23] The government's good faith reliance on the accused's guilty plea severely impaired its ability to obtain a conviction at a later trial.[24] With the passage of time,[25] some witnesses may become unavailable, and the memory of available witnesses can erode. If the accused can now press his or her constitutional claim, the government will be in the position of having to present a case that realistically it may no longer be able to prove up.[26] When the accused pleads guilty, the government ordinarily does not fully prepare for trial.[27] It is unfair to expect the government to build its case from scratch years later.[28] As a practical matter, the prejudice to the state is often incurable.[29]

The government's litigating position in this situation differs radically from the position it is typically in after an appeal from a trial on the merits.[30] Even if the prosecution's witnesses become unavailable in the interim before a second trial, the prosecution will probably be able to introduce their testimony under the former testimony hearsay exception.[31] Although the government may no longer be able to call the witnesses who appeared at the first trial, their testimony has been preserved in a form that will make it readily admissible at a later trial.[32] Thus, at the second trial, the government is in essentially the same litigating position that it was in prior to the accused's plea at the first trial.[33] In this situation, the government has not suffered any substantial, incurable prejudice.

17. *Id.*
18. *Id.* at 1258–59.
19. *Id.* at 1236–37, 1259–60.
20. *Id.* at 1237.
21. *Id.* at 1235, 1248, 1252 (noting that reprosecution will be difficult).
22. *Id.* at 1258.
23. *Id.* at 1236.
24. *Id.* at 1236, 1238.
25. *Id.* at 1235.
26. *Id.* at 1247.
27. *Id.* at 1248.
28. *Id.* at 1249.
29. *Id.* at 1220, 1227.
30. *Id.* at 1219, 1247 (discussing Blackledge v. Perry, 417 U.S. 21 (1974)).
31. *Id.* at 1249; *see* Fed. R. Evid. 804(b)(1).
32. Westen, *supra* note 7, at 1235.
33. *Id.*

Professor Westen's insight was that this notion of prejudice permitted the reconciliation of the Court's decisions addressing the question of when the accused had forfeited the right to press an otherwise meritorious claim.[34] Even when the claim had both merit and a constitutional dimension,[35] the probability of substantial prejudice to the government's litigation position justified a finding that the accused had forfeited the claim.

2. Invoking the Forfeiture Principle to Answer the Threshold Question of Whether to Allow the Innocent Party to Introduce Otherwise Inadmissible Evidence to Rebut the Evidence Injected by the Opposing Litigant

One of the most detailed analyses of the curative admissibility doctrine appears in the new edition of the McCormick treatise.[36] One passage in McCormick addresses the threshold question of whether the trial judge ought to permit the innocent party to respond to the other litigant's introduction of inadmissible evidence:

> If the inadmissible evidence sought to be answered is irrelevant and not prejudice-arousing, the judge, to save time and to avoid distraction from the issues, should refuse to hear answering evidence; but if he does hear it, under the prevailing view the party opening the door has no standing to complain. Consider, for example, a case in which one party improperly injects evidence of the good character of one of his distant relatives who played a minor role in the litigated event. That type of evidence is unlikely to change the outcome of the trial; and it would hardly be an abuse of discretion for the judge to exclude the opponent's evidence attacking the relative's character.[37]

In an ensuing passage, the treatise declares,

> Suppose alternatively that, although inadmissible, the evidence is relevant to the issues and hence presumably damaging to the adversary's case, or though irrelevant is materially prejudicial and the adversary seasonably objected or moved to strike. Here the adversary should be entitled to give answering evidence .... His remedy of assigning appellate error to the ruling is inadequate. He needs a fair opportunity to win his case at the trial level by refuting the damaging evidence. In many cases, the adversary simply cannot afford the expense of a second trial after an appeal. Assume that a litigant succeeds in introducing inadmissible evidence of his own good character. That evidence is much more likely to affect the verdict than testimony about a distant relative's character.[38]

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34. *Id.* at 1260.

35. *Id.* at 1217.

36. 1 McCormick on Evidence § 57, at 288–92 (6th ed. 2006).

37. *Id.* § 57, at 290–91, 291 n.8 (citing Fortner v. Bruhn, 31 Cal. Rptr. 503 (Dist. Ct. App. 1963)); *see also* Gilligan & Imwinkelried, *supra* note 1, at 828–29.

38. McCormick on Evidence, *supra* note 36, § 57, at 291 & n.11 (citing People v. Matlock, 89 Cal. Rptr. 862 (Ct. App. 1970)); *see also* Gilligan & Imwinkelried, *supra* note 1, at 828.

It is true that the treatise neither cites Professor Westen nor expressly refers to "forfeiture." However, on reflection, it seems clear that Professor Westen's conception of forfeiture is the best rationale for the outcomes urged by the treatise. The relevant section of the treatise makes it clear that it is addressing the fact situation in which one litigant has already introduced inadmissible evidence.[39] The section indicates that the curative admissibility doctrine governs whether the trial judge should permit the other party to respond in kind with otherwise inadmissible evidence.[40] Yet the section does not even suggest that before granting permission the judge must find that the first litigant subjectively intended to surrender the protection of evidentiary rules. In short, even implicitly, the section does not resort to waiver reasoning.

Rather, the section focuses on the question of the prejudicial nature of the inadmissible evidence introduced by the first litigant.[41] In the first passage quoted above, the section argues in effect that the judge ought to deny permission to the innocent party because the inadmissible evidence did little or no damage to that party's litigation position at trial.[42] In contrast, the second passage contends that there the judge should grant permission because the inadmissible evidence likely did serious damage to the innocent party's litigation position.[43] In short, both passages are explicable in terms of Professor Westen's concept of forfeiture. Thus, in order to resolve the threshold issue of whether to grant the innocent party permission to introduce otherwise inadmissible, rebuttal evidence, the trial judge should turn to the basic principle of forfeiture, as outlined by Westen.

B. *The Deterrence Principle Relevant to the Question of How Far the Other Litigant Should Be Permitted to Go in Responding with Otherwise Inadmissible Evidence*

Assume that the trial judge resolves the threshold question by concluding that the first litigant's inadmissible evidence is likely to prejudice the innocent party's litigation position and that consequently, the innocent party ought to be allowed to invoke the curative admissibility doctrine. The next question that naturally arises is how far the judge should permit the innocent party to go.

One outer limit is clear: The trial judge should restrict the innocent party to introducing inadmissible evidence relevant to rebut the inadmissible evidence injected by the first party. The first party has forfeited the protection of the evidentiary rules only to the extent necessary to cure the prejudice caused by the injection of the inadmissible evidence. Even if deliberate, the first party's violation of evidentiary rules does not give the

39. McCormick on Evidence, *supra* note 36, § 57, at 288–89.
40. *Id.*
41. *Id.* § 57, at 290.
42. *Id.* § 57, at 290–91.
43. *Id.* § 57, at 291.

innocent party license to introduce any testimony prejudicial to the first party and to disregard the evidentiary rules relevant to such testimony.[44] The doctrine is termed "curative" admissibility precisely because it is intended to enable the innocent party to cure the wrong done by the first party[45]—not to perpetrate a separate wrong. The doctrine's curative rationale does not support that extension of the doctrine, and the systemic interest in the consistent enforcement of the evidentiary rules prescribed by the legislatures or appellate courts cuts against that extension.

1. The Trial Judge's Options as to the Extent of the Permissible Response by the Innocent Party

However, suppose both that the first party's inadmissible evidence prejudiced the innocent party and that the inadmissible evidence proffered by the innocent party is logically relevant to rebut the evidence injected by the first party. By way of example, suppose that on direct examination of a civil plaintiff, his or her attorney injects the plaintiff's inadmissible testimony about his or her own good character.[46] How far should the trial judge permit the defense to go in counteracting the plaintiff's inadmissible good character evidence? The forfeiture principle itself does not provide an answer to that question. Should the judge confine the defense to cross-examining the plaintiff about acts that otherwise would not be proper subject matter for cross-examination under Federal Rule 608(b)? By its terms, that Rule ordinarily authorizes inquiry only about acts that are probative of the witness's character trait of "untruthfulness."[47] If on direct examination the plaintiff made a sweeping assertion about his general, moral, law-abiding character, the defense can argue that the judge should allow cross-examination about bad acts that rebut that assertion even though they do not concern the plaintiff's untruthfulness.

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44. The strongest fact situation for invoking the curative admissibility doctrine is a case in which (1) the first party violates one evidentiary rule that would otherwise bar testimony prejudicial to the innocent party, and (2) the innocent party proffers rebuttal evidence that would otherwise be barred only by the same evidentiary rule. For example, the first party violates the character evidence rules to introduce inadmissible evidence of his or her good character, and the second party attempts to respond by introducing otherwise inadmissible evidence of the first party's bad character. *See, e.g.*, People v. Matlock, 89 Cal. Rptr. 862 (Ct. App. 1970). Neither the courts nor the commentators have specifically addressed the question of whether the first party's violation should entitle the innocent party to introduce relevant rebuttal evidence even when the rebuttal evidence runs afoul of a different exclusionary rule of evidence. It seems arguable, though, that, if the first party has introduced inadmissible evidence prejudicing the innocent party, the latter party ought to be allowed to present any evidence necessary to counteract the prejudice even when the rebuttal evidence is barred by another exclusionary rule.

45. McCormick on Evidence, *supra* note 36, § 57, at 288–92. *See generally* Gilligan & Imwinkelried, *supra* note 1.

46. Before an attack by the defendant, such testimony would be inadmissible on both the historical merits of the case and for the purpose of bolstering the plaintiff's credibility. Fed. R. Evid. 404, 405, 608.

47. Fed. R. Evid. 608(b).

Or, assume that during the course of the direct examination, the plaintiff's attorney repeatedly injected inadmissible evidence of the plaintiff's good character. Even though Rule 608(b) permits cross-examination about the witness's untruthful acts, the Rule explicitly provides that those acts "may not be proved by extrinsic evidence."[48] Faced with repeated evidentiary violations on direct examination, the defense can urge that even impeaching cross-examination will be an inadequate antidote to the prejudice done to the defense case by the direct examination.

How should the trial judge rule on these defense arguments? What policy considerations should guide the judge in deciding how far to allow the innocent party to go?

2. Invoking the Basic Principle of Deterrence to Answer the Next Question of How Far the Trial Judge Should Permit the Innocent Party to Go in Responding to the Opposing Litigant's Inadmissible Evidence

One point of agreement about the curative admissibility doctrine is that even in most cases in which the doctrine comes into play, the innocent party does not have a full-fledged right to introduce the otherwise inadmissible rebuttal evidence. Instead, when the first party's conduct triggers the doctrine, the trial judge has discretion in deciding both whether to invoke the doctrine and how far to allow the innocent party to go.[49] When the courts describe the doctrine, they typically use language of discretion[50] rather than true entitlement.[51]

As previously stated, curative admissibility is sometimes confused with specific contradiction impeachment.[52] However, there are profound differences between the two evidentiary doctrines. Specific contradiction is a recognized method of impeachment.[53] If the proponent introduces a witness's testimony expressly asserting a proposition, as a general rule[54] the

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48. *Id. See generally* Gerald L. Shargel, *Federal Evidence Rule 608(b): Gateway to the Minefield of Witness Preparation*, 76 Fordham L. Rev. 1263 (2007) (discussing the ethical dilemma attorneys face under Rule 608(b) when preparing clients for trial).

49. Gilligan & Imwinkelried, *supra* note 1, at 833–34.

50. *Id.* at 833 n.162 (citing Ryan v. Bd. of Police Comm'rs, 96 F.3d 1076, 1082 n.1 (8th Cir. 1996) (using the language "a court may permit"); United States v. Rea, 958 F.2d 1206, 1225 (2d Cir. 1992) ("The concept . . . gives the trial court discretion."); United States v. Nardi, 633 F.2d 972 (1st Cir. 1980); Grist v. Upjohn Co., 168 N.W.2d 389 (Mich. Ct. App. 1969); Franklin Fire Ins. Co. v. Coleman, 87 S.W.2d 537 (Tex. Civ. App. 1935)).

51. It is true that in one situation the McCormick treatise states that, under the curative admissibility doctrine, the innocent party has a right to respond. *See supra* note 37 and accompanying text. However, it is easy to reach the same result without positing the existence of a right. Simply stated, it would be an abuse of discretion to exclude the rebuttal evidence in such a fact situation.

52. *See* Gilligan & Imwinkelried, *supra* note 1, at 816–23.

53. *See* McCormick on Evidence, *supra* note 36, § 49, at 232–38.

54. Of course, the judge has a residual discretion to bar the specific contradiction evidence under Rule 403. Rule 403 reads, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403. With the exception of

opponent may impeach the witness as of right by introducing extrinsic evidence directly contradicting that proposition.[55] The curative admissibility doctrine is at once broader and more discretionary in character. While specific contradiction evidence must impeach the prior witness's testimony with relative directness,[56] the innocent party's evidence introduced under the curative admissibility doctrine need only relate to the same subject[57] or issue.[58] Again, while the specific contradiction doctrine gives the opponent a presumptive[59] right to impeach, the innocent party relying on curative admissibility must appeal to the trial judge's discretion.[60] Given the doctrine's breadth—the expansive permissibility of curative evidence on the same subject or issue—the doctrine's discretionary character compels the trial judge to make a policy choice as to the extent of the allowable rebuttal.

What factors should inform the exercise of the trial judge's discretion as to that choice? It has been suggested that judges should consider employing their discretion for frankly prophylactic purposes,[61] that is, to deter further unethical violations of evidentiary rules by the opposing litigant.[62] Given the contours of the curative admissibility doctrine—its discretionary nature and the breadth of its authorization of evidence on the same subject or issue as the inadmissible evidence injected by the first party—it is inevitable that the judge must make a policy choice. Although the deterrence of future evidentiary violations by the first party smacks of the enforcement of legal ethical rules, such deterrence is an attractive candidate to serve as a basis for guiding the judge's discretion. To be sure, it serves the extrinsic social policy of encouraging compliance with legal ethical norms. However, it does far more. More to the point, it encourages compliance with evidentiary norms. If a ruling encouraging compliance with evidentiary norms incidentally promotes compliance with another body of legal rules, all the better. After all, the evidentiary and ethical rules are part of the same legal system, and, whenever possible, they should cohere.

Revisit the prior hypotheticals in which the plaintiff's attorney overreached the good character evidence rules on direct examination.

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convictions automatically admissible for impeachment under Federal Rule 609(a)(2), all proffered evidence is potentially subject to discretionary exclusion under Rule 403. Paul F. Rothstein, *Some Themes in the Proposed Federal Rules of Evidence*, 33 Fed. B.J. 21, 29 (1974).

55. Gilligan & Imwinkelried, *supra* note 1, at 829, 831–32.

56. *Id.*

57. *Id.* at 829 n.144 (citing Lala v. Peoples Bank & Trust Co., 420 N.W.2d 804, 807–08 (Iowa 1988); State v. Tyler, 676 S.W.2d 922, 925 (Mo. Ct. App. 1984) (using the language "about the same document")).

58. *Id.* at 829 n.145 (citing United States v. Forrester, 60 F.3d 52 (2d Cir. 1995); United States v. Rea, 958 F.2d 1206, 1225 (2d Cir. 1992)).

59. *Id.* at 831; *see also supra* note 54.

60. Gilligan & Imwinkelried, *supra* note 1, at 833–34.

61. *Id.* at 835.

62. *Id.*

Suppose that the trial judge's sense was that the plaintiff's evidentiary violation was deliberate, knowingly calculated to gain an unfair advantage by flouting an evidentiary rule. In earlier stages of the trial, the plaintiff's attorney had displayed an excellent understanding of evidence law. Moreover, the attorney questioned the plaintiff in a hurried manner on that topic, and the judge strongly suspected that the attorney was rushing to prevent the defense from interposing a character objection that the attorney realized would be valid. Faced with a choice between confining the defense to cross-examination or accepting the receipt of extrinsic defense rebuttal evidence, the judge could legitimately choose the second option for deterrence purposes.

3. The Fairness of Imputing the Offending Attorney's Evidentiary Misconduct to His or Her Client

Yet this application of the deterrence principle raises a nagging question: is it legitimate to visit the plaintiff's attorney's sins on the plaintiff? Assume that the plaintiff did not realize that the testimony elicited from him was inadmissible. In these circumstances, is it fair to impute the attorney's unethical conduct to the client? That imputation seems appropriate.

In general, in litigation the attorney acts as the client's agent and representative.[63] Even more specifically, at trial the attorney possesses implied-in-law power to assert or waive evidentiary rules, even privileges protecting the client's intensely personal privacy interests[64]:

> To some extent, conceding that limited authority to the attorney is necessitated by trial administration policies. Privileges often must be asserted at trial, and neither the holder nor the holder's counsel may have been able to anticipate the proffer of the privileged testimony. In that event, the defense may have to decide whether to assert or waive in the brief interim—a matter of seconds—between the conclusion of the question calling for the privileged information and the beginning of the answer disclosing the information. As a practical matter, before objecting, there may not be enough time for the counsel . . . to consult with the client as to whether to waive the privilege. If the client's [actual] consent were necessary in such cases, the admission of privileged information would be error in a large number of cases, and privilege issues would multiply on appeal. Thus, there [is a] . . . logic to binding

63. Restatement (Third) of the Law Governing Lawyers § 61 cmt. a (2000) (referring to "the agency power of lawyers"); *see also* Standards for Criminal Justice: Prosecution Function and Defense Function Standard 4-5.2(b) (3d ed. 1993) (noting that the defense counsel makes the final decision to determine "what witnesses to call, whether and how to conduct cross-examination, . . . and what evidence should be introduced").

64. 8 John Henry Wigmore, Evidence in Trials at Common Law § 2325 (John T. McNaughton ed., rev. ed. 1961).

> the client by [even] the counsel's inadvertent omissions [to raise privilege objections].[65]

When the first attorney engages in intentional misconduct triggering the curative admissibility doctrine, it is especially appropriate to allow the innocent litigant to rebut. In most cases, the first attorney committed the evidentiary misconduct in the hope of gaining an unfair advantage for his or her client.[66] Worse still, when the first attorney injects inadmissible evidence that is damaging enough to bring the curative admissibility doctrine into play, the introduction of that evidence may well have that desired effect unless the trial judge permits rebuttal. The first attorney's client is the intended and likely beneficiary of his or her attorney's evidentiary misconduct. It is only fair that the client should also bear the burden that the trial judge will admit the innocent party's rebuttal evidence against the client. Rather than complaining about the receipt of the rebuttal evidence, the client's recourse ought to be against his or her own attorney for malpractice.

II. THE PERMISSIBILITY OF INVOKING THE PRINCIPLES OF FORFEITURE AND DETERRENCE TO RATIONALIZE THE CURATIVE ADMISSIBILITY DOCTRINE UNDER THE FEDERAL RULES OF EVIDENCE

Part I outlined the jurisprudential case for employing the basic principles of forfeiture and deterrence to clarify the curative admissibility doctrine. If evidence doctrine were still in common law form in most jurisdictions, it would be a simple matter for the courts to embrace this jurisprudential case. In a common law system, the courts would have the power to adopt the proposal advanced in Part I.

However, in most jurisdictions, evidence law is no longer in decisional form. The Federal Rules of Evidence took effect in statutory form in 1975.[67] Forty-one states have evidence codes patterned directly after the Federal Rules,[68] and other jurisdictions such as California have also enacted comprehensive legislative schemes governing evidence practice.[69] The upshot is that, as in federal practice, roughly nine-tenths of the states have statutory evidence schemes. This is the Age of Statutes in American evidence law.[70] In this age, the courts cannot employ the forfeiture and deterrence principles to reform the curative admissibility doctrine simply because they believe that the reform is desirable as a matter of policy. Instead, out of respect for the statutory schemes, the courts must also ask

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65. Francis A. Gilligan & Edward J. Imwinkelried, *Waiver Raised to the Second Power: Waivers of Evidentiary Privileges by Lawyers Representing Accused Being Tried* in Absentia, 56 S.C. L. Rev. 509, 530 (2005).

66. *See* Gilligan & Imwinkelried, *supra* note 1, at 835.

67. Ronald L. Carlson et al., Evidence: Teaching Materials for an Age of Science and Statutes 20 (6th ed. 2007).

68. *Id.* at 21.

69. *Id.* at 22.

70. *See generally* Guido Calabresi, A Common Law for the Age of Statutes (2000).

whether the legislation permits them to do so. If, properly construed, the governing statutes preclude that course of action, the strength of the jurisprudential case is irrelevant. Even assuming arguendo the soundness of the jurisprudential case, the courts must confront the statutory interpretation issues.

A. *Should the Federal Rules of Evidence Be Interpreted as Permitting the Courts to Use the Forfeiture Principle to Resolve the Threshold Question of Whether to Permit the Innocent Party to Introduce Otherwise Inadmissible Rebuttal Evidence?*

To answer this question, we must address the statutory interpretation issue in two different time periods: prior to and after the 1997 amendment adding Federal Rule of Evidence 804(b)(6) to the statutory scheme.

1. Prior to the 1997 Amendment to Federal Rule 804(b)

Prior to the 1997 amendment of the Federal Rules of Evidence, it was relatively clear that the courts could employ the principle of forfeiture in interpreting and applying the Rules. As Professor Ronald Dworkin has pointed out, there is a distinction between legal rules and legal principles.[71] "Rules" are phrased in relatively specific terms and mandate particular behaviors. In contrast, "principles" operate at a higher level of abstraction and are worded more generally. They often function as tools for legal reasoning about more specific rules.

In that light, the provisions of the Federal Rules should indeed be characterized as "rules." For example, the hearsay exception provisions in Rule 803 mandate particular judicial behavior (overruling a hearsay objection) when the proponent establishes the specified foundational facts. However, the text of the Federal Rules is silent about more generalized principles. It is true that waiver is a more generalized principle and that the Supreme Court's draft of article V of the Federal Rules contained a provision governing waiver of evidentiary privileges.[72] However, Congress balked at enacting that provision.[73] Yet the courts, including the Supreme Court, have frequently held that litigants waived the protection of particular provisions of the Federal Rules.[74] These holdings reflect a judicial

71. Ronald Dworkin, Taking Rights Seriously 22 (1977); *see also* Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev., 430 F. Supp. 2d 222, 241 n.20 (S.D.N.Y. 2006).

72. Christopher B. Mueller & Laird C. Kirkpatrick, Federal Rules of Evidence: With Advisory Committee Notes and Legislative History 325 (2005).

73. *Id.* at 285, 325.

74. *See, e.g.*, United States v. Mezzanatto, 513 U.S. 196 (1995); United States v. Krilich, 159 F.3d 1020, 1024–25 (7th Cir. 1998), *cert. denied*, 528 U.S. 810 (1999); United States v. Burch, 156 F.3d 1315 (D.C. Cir. 1998), *cert. denied*, 526 U.S. 1011 (1999); United States v. Young, 73 F. Supp. 2d 1014 (N.D. Iowa 1999), *rev'd on other grounds*, 223 F.3d 905 (8th Cir. 2000), *cert. denied*, 531 U.S. 1168 (2001).

consensus that in applying the Federal Rules, the courts may utilize reasoning based on the basic principle of waiver.

Like waiver, forfeiture constitutes a basic legal principle rather than a fully specified rule. If the Federal Rules allow the courts to continue to rely on waiver-based reasoning in applying the Rules' statutory provisions, by parity of reasoning, it is permissible for the courts to resort to forfeiture-based reasoning.

2. After the 1997 Amendment to Federal Rule of Evidence 804(b)

Effective 1997, Rule 804(b) was amended to add subdivision 804(b)(6).[75] That provision reads,

> (b) Hearsay exceptions.—The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> (6) Forfeiture by wrongdoing.—A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.[76]

As a result of this amendment, the text of the Federal Rules now includes an express reference to "forfeiture." Given that reference, a party resisting the invocation of the curative admissibility doctrine might contend that the Rules now preclude the operation of that doctrine. The argument would rely on a variation of the hoary interpretive maxim, *Expressio unius est exclusio alterius* (the express mention of one impliedly excludes the other).[77] In the 1997 amendment, the drafters expressly sanctioned forfeiture-based reasoning in one evidentiary setting. The party opposing continued recognition of the curative admissibility doctrine might contend that since the drafters explicitly approved of the forfeiture concept in only one context, the implication is that they disapproved of reliance on forfeiture-based reasoning in every other evidentiary context.

While the above line of argument has some plausibility, ultimately the argument is flawed. To begin, this interpretation of the amendment is at odds with the amendment's legislative history. The Advisory Committee note accompanying the amendment indicates that the drafters' simple intent was to expand the admissibility of hearsay evidence.[78] Not only does the note not avow an intent to contract admissibility standards in other contexts, there is not even a faint suggestion that the drafters also entertained that intent. The note does not evidence any intent to constrain the courts from resorting to the forfeiture principle in any other evidentiary setting.

Further, the courts certainly have not construed the amendment in that fashion. As previously stated, if the courts had embraced that

75. Fed. R. Evid. 804(b)(6).

76. *Id.*

77. 2A Norman J. Singer, Statutes and Statutory Construction §§ 47:23–25 (6th ed. 2000).

78. Fed. R. Evid. 804(b)(6) advisory committee's note (amended 1997).

interpretation, they would no longer uphold forfeiture-based reasoning in other evidentiary settings. However, they continue to do so. Federal Rule of Evidence 615 is a case in point.[79] That Rule governs the sequestration of witnesses. On its face, Rule 615 announces a seemingly absolute rule that "a party who is a natural person" cannot be sequestered and excluded from the courtroom during his or her trial.[80] However, under the Supreme Court's 1970 decision in *Illinois v. Allen*,[81] a trial judge may exclude a disruptive litigant—even a criminal accused who enjoys a Sixth Amendment confrontation right—from the courtroom. The *Allen* doctrine obviously rests on forfeiture reasoning. It is fanciful to infer that the disruptive accused subjectively intends to waive his or her right to be present. Quite to the contrary, the accused desperately wants to remain present in order to disrupt the proceeding. The *Allen* doctrine is justified on the theory that if the disruptive accused remains at counsel table, he or she will prejudice the government's litigation position and impair its ability to present its case in a coherent, convincing manner. If the 1997 amendment barred forfeiture-based reasoning outside the hearsay context, the courts could not continue to invoke the *Allen* doctrine and find that disruptive accused have forfeited their rights under Rule 615. Yet courts and commentators alike still proceed on the assumption that such forfeitures are possible.[82]

Hence, even after the 1997 amendment to Rule 804(b), it is permissible for a federal court to employ forfeiture-based reasoning in applying the Rules codified in the statutory text. If so, the courts may resort to such reasoning in answering the threshold question under the curative admissibility doctrine as to whether it is at all allowable for the innocent party to present otherwise inadmissible rebuttal evidence. In accordance with the forfeiture principle, the courts should hold that the evidence is allowable when its presentation would counteract the prejudice that the opposing litigant's introduction of inadmissible evidence has caused to the innocent party's case.

B. *Should the Federal Rules of Evidence Be Interpreted as Permitting the Courts to Use the Deterrence Principle to Resolve the Question of How Far to Allow the Innocent Party to Go in Countering the Effect of the Inadmissible Evidence Injected by the Opposing Party?*

1. Federal Rule 402

While the party resisting the invocation of the curative admissibility doctrine might cite the Rule 804(b) amendment in an attempt to preclude

79. Fed. R. Evid. 615.
80. *Id.*
81. 397 U.S. 337, 343 (1970).
82. 5 Wayne R. LaFave, Jerold H. Israel & Nancy J. King, Criminal Procedure § 24.2(c), at 462 n.38 (2d ed. 1999).

the application of the forfeiture principle, he or she might point to Rule 402 in an effort to foreclose the application of the deterrence principle.

At first blush, the wording of Rule 402 might strike the reader as innocuous. In pertinent part, the statute provides, "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority."[83] On closer examination, though, the language has an important—even revolutionary—implication. While the statute appears to include an exhaustive list of sources of law such as constitutional provisions and statutes, one source of law is conspicuously absent from the list—case or decisional law. If the statutory language, "All relevant evidence is admissible," should be construed as generally requiring the admission of relevant evidence and the only permissible bases for excluding relevant evidence are the specified sources of law, the legislation deprives the courts of their common law power to enforce uncodified exclusionary rules of evidence.[84]

There is a strong case that Rule 402 should be construed as impliedly depriving the courts of that power. The Advisory Committee note to Rule 402 states the drafters used such model evidence statutes as Uniform Rule 7 as a model for Rule 402.[85] Uniform Rule 7 stated that "[e]xcept as otherwise provided in these Rules, . . . all relevant evidence is admissible."[86] Kansas was one of the few states to adopt the Uniform Rules.[87] Commenting on Rule 7, the Kansas drafting committee remarked that "[t]his rule wipes out all existing restrictions . . . on the admissibility of relevant evidence."[88]

The same note cites California Evidence Code § 351 as a model for Rule 402.[89] That statute states that, "[e]xcept as otherwise provided by statute, all relevant evidence is admissible."[90] The statute was drafted by the California Law Revision Commission. The commission flatly asserted that § 351 would "not permit the courts to develop additional exclusionary rules."[91]

The Advisory Committee note provides additional evidence that the committee's omission of any mention of the common law in Rule 402 was purposeful. The fifth paragraph of the note contains an explicit mention of

83. Fed. R. Evid. 402.

84. *See* Edward J. Imwinkelried, *Federal Rule of Evidence 402: The Second Revolution*, 6 Rev. Litig. 129, 130 (1987).

85. Fed. R. Evid. 402 advisory committee's note.

86. 22 Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure: Evidence § 5191, at 175 n.14 (1978).

87. *Id.* § 5191, at 175.

88. *Id.* § 5191, at 178 n.9.

89. Fed. R. Evid. 402 advisory committee's note.

90. Cal. Evid. Code § 351 (West 1995).

91. 7 Cal. Law Revision Comm'n, Recommendation Proposing an Evidence Code 343 (1965).

"common law rules."[92] The drafters obviously knew how to refer to such rules when they wanted to. The inclusion of that mention in the note strengthens the inference that they made a conscious decision to omit case or decisional law from the list of the sources of law that may authorize the exclusion of logically relevant evidence.

During the congressional deliberations over the proposed Federal Rules, the witnesses generally assumed that the enactment of Rule 402 would deny trial judges the power to exclude relevant evidence on any basis other than the listed types of laws.[93] In the words of one witness, after the adoption of the Federal Rules, the judicial enforcement of uncodified exclusionary rules of evidence "will in all probability be prevented."[94]

The surrounding political circumstances confirm that that is the most sensible interpretation of Rule 402:

> The [proposed] Rules reached Congress at a time when many of its members sought to reclaim powers believed to have been lost by that branch to the Executive and Judiciary. In the aftermath of Watergate, Congress was jealous of its prerogatives vis-à-vis both the Executive and the Judiciary. The President [Richard Nixon] had invoked evidentiary doctrines in an attempt to persuade the courts to block Congress' investigation into the Watergate break-in, and that attempt was probably fresh in Congress' memory when the Supreme Court transmitted the Federal Rules to Congress.[95]

Any remaining doubt as to the correct construction of Rule 402 evaporated when the Supreme Court handed down its celebrated 1993 scientific evidence decision, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[96] In 1923, the U.S. Court of Appeals for the D.C. Circuit had announced a general acceptance test for the admissibility of scientific evidence: testimony based on a scientific theory or technique is admissible only if the theory or technique has gained general acceptance within the relevant specialty circles.[97] By the early 1970s, *Frye v. United States*[98] had become the overwhelming majority view at American common law. In *Daubert*, the question presented was whether the *Frye* general acceptance test was still good law. Had *Frye* survived the enactment of the Federal Rules? In 1978, the reporter for the original Advisory Committee, the late Professor Edward Cleary, wrote a now-famous article about the interpretation of the Federal Rules.[99] In discussing Rule 402, Professor Cleary wrote that, "[i]n principle, under the Federal Rules no common law

92. Fed. R. Evid. 402 advisory committee's note.
93. *See* 22 Wright & Graham, *supra* note 86, § 5199, at 222.
94. *Id.* § 5199, at 222 n.17.
95. Carlson et al., *supra* note 67, at 20.
96. 509 U.S. 579 (1993).
97. 1 Paul C. Giannelli & Edward J. Imwinkelried, Scientific Evidence § 1.05 (4th ed. 2007).
98. 293 F. 1013 (D.C. Cir. 1923).
99. Edward W. Cleary, *Preliminary Notes on Reading the Rules of Evidence*, 57 Neb. L. Rev. 908 (1978).

of evidence remains."[100] The text of the Federal Rules nowhere purported to codify the general acceptance test. Approvingly citing that passage in Professor Cleary's article, the *Daubert* Court held that Rule 402 impliedly overturned *Frye*.[101] It did not matter that as a precedent, *Frye* dated back seventy years. Nor did it matter that *Frye* had been the overwhelming majority view at common law. The text of the Federal Rules could not reasonably bear the interpretation that it codified any general acceptance test, and Rule 402 therefore superseded *Frye*.

If Rule 402 is that powerful, a litigant opposing the court's adoption of the deterrence principle may argue that Rule 402 precludes the courts from using evidentiary rulings as a means of enforcing legal ethical rules. *United States v. Lowery*[102] lends credibility to that argument. In *Lowery*, a Florida Bar Rule of Professional Conduct forbade attorneys from offering certain inducements to witnesses. The defense counsel argued both that the Rule applied to federal prosecutors and that the prosecutors had violated the Rule by promising a witness a favorable sentence recommendation. The defense counsel urged the court to bar the witness's testimony on the basis of the violation of the state ethical rule. The appellate court rejected the urging. The court pointed out that state ethics rules are not one of the sources of law catalogued in Rule 402. The court reasoned that Rule 402 therefore precluded the trial judge from barring relevant evidence on the ground that the proponent of the evidence had obtained it in violation of a rule of legal ethics. The court remarked, "State rules of professional conduct . . . cannot trump the Federal Rules of Evidence. . . . That [enumeration in Rule 402] is an exclusive list of the sources of authority for exclusion of evidence in federal court. State rules of professional conduct are not included in the list."[103]

In light of the legislative history of Rule 402 and precedents such as *Lowery*, there is a seemingly solid argument that, as a generalization, under the statutory scheme of the Federal Rules a court may not make an evidentiary ruling for the specific purpose of enforcing legal ethical rules. However, that argument misreads Rule 402 and overlooks Rule 102, an important part of the context of Rule 402.

The above generalization about Rule 402 is an overstatement. Again, the pivotal sentence in Rule 402 decrees that "[a]ll relevant evidence is admissible, except as otherwise provided by" the listed sources of law.[104] On its face, the statute precludes courts from *excluding* logically relevant evidence on a basis other than one derived from the listed sources of law; as *Lowery* teaches, the statutory language ordinarily prohibits a court from excluding relevant evidence in order to promote a legal ethics rule. However, that prohibition is inapposite here. In the curative admissibility

100. *Id.* at 915.
101. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 587–88 (1993).
102. 166 F.3d 1119 (11th Cir. 1999) (citations omitted).
103. *Id.* at 1125.
104. Fed. R. Evid. 402.

setting, the trial judge is *admitting* rebuttal evidence in part for that purpose. The first sentence of Rule 402 is inapplicable to the curative admissibility problem.

There is a second sentence in Rule 402: "Evidence which is not relevant is not admissible."[105] So long as the innocent party's rebuttal evidence is relevant to the issue injected by the opposing attorney, the receipt of the rebuttal evidence complies with Rule 402. The opposing attorney is hardly in a position to argue that the admission of the rebuttal testimony will violate the second sentence of Rule 402. By introducing his or her own inadmissible evidence, the opposing attorney has "invited" relevant rebuttal testimony.[106]

2. Federal Rules 102 and 403

The statutory interpretation analysis does not end with the text of Rule 402. Modern courts stress that statutes must be construed in context, that is, within the overall framework of the legislative scheme that they are part of.[107] Rules 102 and 403 are also part of the scheme of the Federal Rules of Evidence.

Rule 102 states, "These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."[108] Rule 102 is not only part of the same statutory scheme, it is also highly relevant to the construction of Rule 402 because, on its face, Rule 102 purports to enunciate policies that are to guide the way in which "[t]hese rules shall be construed."[109]

However, Rule 102 poses obvious interpretive problems. The statutory text is vague in the extreme. The Rule directs that trial judges interpret the statutes with a view to ensuring that "proceedings [are] justly determined," but, like truth, "justice" is a concept that philosophers have debated for millennia.[110] To make matters worse, while some Federal Rules are accompanied by detailed Advisory Committee notes elucidating the statutory text, the note to Rule 102 is both extremely short and unhelpful.[111] The note provides absolutely no insight into what the drafters meant by the expression "justly determined."

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105. *Id.*

106. William H. Fortune, Richard H. Underwood & Edward J. Imwinkelried, Modern Litigation and Professional Responsibility Handbook: The Limits of Zealous Advocacy § 13.8 (1996).

107. *See* Singer, *supra* note 77, § 47:02.

108. Fed. R. Evid. 102.

109. *Id.*

110. 21 Wright & Graham, *supra* note 86, § 5026, at 516–23.

111. Fed. R. Evid. 102 advisory committee's note ("For similar provisions see Rule 2 of the Federal Rules of Criminal Procedure, Rule 1 of the Federal Rules of Civil Procedure, California Evidence Code § 2, and New Jersey Evidence Rule 5.").

Yet it is possible to identify a core meaning of the expression. The Washington State drafters decided to adopt Federal Rule 102.[112] The official Judicial Council comment to Rule 102 explains that the reference to "justly" in the statutory text is intended as a signal that trial judges should apply evidence law in a fashion that reduces the probability of "an unjust result."[113] Rule 403 helps to shed light on the meaning of an unjust result. For its part, Rule 403 reads, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[114] The concept of "unfair prejudice" is certainly kindred to the notion of "injustice." The Advisory Committee note to Rule 403 comments, "'Unfair prejudice' within [this statute] means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."[115]

Think back to the hypothetical curative admissibility problem discussed in Part I.B. That hypothetical is readily distinguishable from *Lowery*. In *Lowery*, the allegedly unethical conduct—the inducements offered the prosecution witnesses—occurred outside court and did not involve the abuse of evidentiary rules. In contrast, in the hypothetical, in court the plaintiff's attorney injects inadmissible evidence of the plaintiff's good character. The obvious purpose of doing so was to invite the jury to decide the case on an improper basis. The attorney probably hoped to blind the jury to some of the weaknesses in the plaintiff's evidence on the merits and to prompt the jury to decide in the plaintiff's favor because of the plaintiff's attractive or sympathetic background. Of course, if the jury returned a plaintiff's verdict for that reason, the verdict would rest on an improper basis.[116] Interpreting Rule 102 in light of Rule 403, such a verdict would amount to an "unjust" result. A ruling, permitting the defense to introduce rebuttal evidence under the curative admissibility doctrine, redresses the plaintiff's attorney's misconduct and increases the probability that the trial will be "justly determined."[117] By deterring future, similar violations by the plaintiff's attorney in this trial and other proceedings, the ruling effectuates the policies identified in Rule 102.

CONCLUSION

As we have seen, the curative admissibility doctrine forces the trial judge to struggle with two issues: should I permit the innocent party to respond with otherwise inadmissible rebuttal evidence, and, if so, how far should I allow the innocent party to go in presenting rebuttal evidence? Until

112. Wash. R. Evid. 102; *see* 21 Wright & Graham, *supra* note 86, § 5026, at 522.
113. Wash. R. Evid. 102 judicial council cmt.
114. Fed. R. Evid. 403.
115. Fed. R. Evid. 403 advisory committee's note.
116. Carlson et al., *supra* note 67, at 351–52.
117. Fed. R. Evid. 102.

recently, the state of the law governing curative admissibility could accurately have been described as confusing and somewhat complex.[118] The cases discussing curative admissibility emphasize the discretionary nature of the doctrine.[119] This essay proposes that trial judges look to the forfeiture principle in answering the initial question and the deterrence principle in resolving the second. In the short term, the adoption of this proposal would not only provide trial judges with guidance in exercising their discretion, but also, even more importantly, the proposal will enable trial judges grappling with the two issues to make more principled decisions and choices.

The mere discussion of the proposal, though, will have a long-term benefit. The discussion will focus a spotlight on Rule 102's reference to "justly determined" proceedings. Rule 102 may be the vaguest provision in the Federal Rules of Evidence. To compound the problem, there are only a few handfuls of decisions construing Rule 102. Yet the Rule is potentially one of the most critical parts of the statutory scheme. The Federal Rules of Evidence differ from both the Federal Rules of Civil Procedure and those of Criminal Procedure; unlike those sets of rules, the Rules of Evidence were formally enacted as statutes. Outcomes under the Rules turn on statutory interpretation proper, and Rule 102 purports to announce policies that can inform the interpretation of every provision in the statutory scheme. Paradoxically, the last policy mentioned in the text of Rule 102 is arguably the most important, increasing the probability that "proceedings" under the Federal Rules will be "justly determined."[120] The courts have long neglected the question of the meaning of that expression in Rule 102. That neglect is intolerable. The courts will never be able to resolve the philosophic dispute over the concept of justice between, for example, Plato and Thomas Aquinas.[121] However, as courts of justice, they should take the legislative reference to "justly determined" in Rule 102 seriously and, as a matter of statutory interpretation, clarify the meaning of that expression. A debate over this proposal to refine the curative admissibility doctrine could be a vehicle to achieve that far more important clarification.

118. *See generally* Gilligan & Imwinkelried, *supra* note 1.
119. *Id.* at 832–33.
120. Fed. R. Evid. 102.
121. 21 Wright & Graham, *supra* note 86, § 5026, at 516–17.